The concept of transferable securities and the exclusion of municipalities as qualified investors for the purposes of prospectus publications: CJEU judgment of 9 January 2025

In this judgment, the CJEU considers that shares whose transfer is subject to approval by the board of directors can be considered transferable securities for the purposes of the European prospectus legislation and MiFID.

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§ 1. In its judgment of 9 January 2025 (ECLI:EU:C:2025:9), the Fourth Chamber of the CJEU gave a preliminary ruling on a question referred concerning the obligation to publish a prospectus in a capital increase of an unlisted Belgian company addressed to its shareholders (Belgian municipalities and provinces).

§ 2. The Court considers that shares that can only be subscribed by these two tiers of government authority and whose transfer is subject to approval by the company's board of directors are transferable securities for the purposes of the then-applicable 2003 Prospectus Directive (now the 2017 Prospectus Regulation), without prejudice to the referring court (the Belgian *Cour de cassation*) verifying that these two conditions do not make "trading [such shares] between offerors of securities and investors" impossible or extremely difficult.

§ 3. In this judgment, the Court rules that "Article 2(1)(a) of Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (...) must be interpreted as meaning that shares in a company that may be held only

by the provinces and municipalities of a Member State and the transfer of which is subject to approval by the board of directors of that company fall within the concept of 'securities' within the meaning of Directive 2003/71, as amended by Directive 2008/11, such that an invitation to subscribe to such shares is subject to the obligation of prior publication of a prospectus, laid down in Article 3(1) of Directive 2003/71" provided that the terms of the offer "do not make the negotiability of those shares on the capital market between offerors and potential investors impossible or extremely difficult and that none of the exceptions set out in Article 3(2) and Article 4 of Directive 2003/71(...)".

The CJEU upholds a broad interpretation of the concept of the negotiability of shares

§ 4. These exceptions are summarised by the Advocate General in his opinion as those offers addressed to fewer than 100 natural or legal persons (now 150), those addressed to qualified investors, those of securities whose denomination per unit amounts to at least EUR 50 000 (now EUR 100 000) or those that require a total consideration of the same amount per investor (now also increased to one hundred thousand euros). As the request for a preliminary ruling does not contain information on these points (number of potential addressees of the offer, nominal value of the shares offered in the increase, etc.), it will be for the referring court, says the Advocate General, to verify these matters.

§ 5. The facts of the case can be summarised as follows: in 1860, *Crédit communal de Belgique* was established for the financing of local authority investments in Belgium. Its shareholders are Belgian municipalities and provinces, including the appellants in the main proceedings, the municipalities of Schaerbeek and Linkebeek. In 1996, Credit communal de Belgique merged with *Credit local de France*, forming the Dexia group. In 1998, *Crédit communal de Belgique* was converted into a holding company under the name *Holding Communal*. The latter company, the judgment states, has a "substantial holding" in Dexia SA. In the context of the 2008 financial crisis, *Holding Communal* participated in the increase of capital in that company of EUR 500 million. After the failure to obtain a loan, the board of directors of *Holding Communal* proposed to the shareholders this capital increase by contributions in cash giving rise to the issue of 'cumulative preference A' shares. After an information meeting, in September 2009 the shareholders of *Holding Communal* approved the capital increase to be carried out in two rounds. The municipality of Schaerbeek subscribed to an increase of EUR 8 161 689.60 in the first round and EUR 1 359 011.84 in the second. The municipality of Linkebeek subscribed to an increase of EUR 53 575.68 in each of the two rounds. On 7 December 2011, at the extraordinary general meeting of *Holding Communal* the shareholders decided that the company should be wound up and liquidated. The shareholders lost all their shares. The two aforementioned municipalities brought an action against *Holding Communal* before the French-speaking Brussels Commercial Court, seeking annulment of their subscriptions to the capital increase agreed in 2009, on the grounds of infringement of the Belgian Act of 16 June 2006 that incorporated

the 2003 Prospectus Directive into the law of that country (*loi du 16 juin 2006 relative aux offres publiques d'instruments de placement et aux admissions d'instruments de placement à la négociation sur des marchés réglementés*). They argued that, prior to inviting shareholders to subscribe to that capital increase, a prospectus should have been published in accordance with that 2006 Act.

§ 6. The Commercial Court considered that this Belgian Act, like the 2003 Prospectus Directive, governed the offer of securities only in so far as they are negotiable on the capital market, which was not the case with the shares in *Holding Communal*. This decision was upheld by the Brussels Court of Appeal in a judgment issued on 12 April 2022: the shares issued as consideration for the contributions in cash were securities that were not negotiable on the capital market since they could be held only by municipal and provincial authorities and their transfer was subject to the approval by the board of directors.

§ 7. The two municipalities lodged an appeal claiming that securities, the offer of which to persons must give rise to the prior publication of a prospectus, cover, with no restrictions, 'shares in companies', even if the transfer of those shares is or is not subject to restrictions, such as the need for approval by the board of directors, or if the persons concerned do or do not belong to a specific category, such as municipal or provincial authorities.

§ 8. Noting that the outcome of the appeal depended on the interpretation of the concept of 'securities' in Article 2.1.a) of the Prospectus Directive, the Belgian Court of Cassation decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling: 'Must Article 2(1)(a) of [the Prospectus Directive], itself referring to point 18 of Article 4(1) of [the MiFID I Directive], be interpreted as meaning that the concept of transferable security negotiable on the capital market covers the shares of a holding company which can be held only by provinces and municipalities and whose transfer is subject to the approval of the board of directors?'

§ 9. Before examining the reasoning of the European Court, it should be pointed out that the content of the articles cited by the CJEU as the basis for its view, taken from the 2003 Prospectus Directive and 2004 MiFID I, has not undergone substantial changes in the current 2017 Prospectus Regulation and 2014 MiFID II. We refer to the concept of a transferable security and that of a qualified investor for the purposes of the obligation to publish a prospectus and the exceptions to this obligation. Thus, the consideration of company shares as transferable securities contained in Article 4(1)(44) of MiFID I (to which Article 2 of the Prospectus Directive refers) is now contained in 4(1)(44) of MiFID II (to which Article 2 of the current Prospectus Regulation refers). The concept of transferable securities as 'those classes of securities which are negotiable on the capital market, with the exception of instruments of payment' contained in MiFID I remains word for word in MiFID II.

§ 10. The exception to the obligation to publish a prospectus when the offer is exclusively addressed to qualified investors in Article 3(2)(a) of the Prospectus Directive is now found in Article 1(4)(a) of the Prospectus Regulation. The concept of qualified investor (professional investor in MiFID terminology), including national and regional governments, can be found in Annex II, section 1.3 of MiFID I and, with the same numbering, of MiFID II.

§ 11. The CJEU's judgment makes no mention of the content of the current legislation (2017

Prospectus Regulation and 2014 MiFID II) beyond mentioning the title of both pieces of legislation as repealing the provisions applied by the judgment. Despite this, the CJEU's conclusions in this judgment can be considered valid in accordance with the new legislation.

§ 12. The judgment of 9 January 2025 also deals with issues not raised by the Advocate General in his opinion of 5 September 2024, such as the non-consideration of municipalities as qualified investors for the purposes of the exceptions to the obligation to publish a prospectus in the case of an offer of securities to the public [Art. 3(2)(a) of the Prospectus Directive and Art. 1(4)(a) of the current Prospectus Regulation]. It makes a literal interpretation of the Prospectus Directive, which only refers in its Article 2(1) to 'national and regional governments' in the concept of qualified investor and therefore considers municipalities as non-qualified investors, so that the exemption from the prospectus for offers addressed exclusively to qualified investors (Art. 3(2)) does not apply. In Spain, municipalities are expressly recognised as professional investors in Article 195 of the Securities Markets and Investment Services Act 6/2023 of 17 March (they already were in Art. 206 of the recast version 2015 following the amendment introduced by Royal Decree-law 14/2018 of 28 September), for the purposes of the rules of conduct for investment service providers (Title VIII of Act 6/2023).

§ 13. Below we will briefly refer to other considerations of the CJEU ruling: on the basis of the opinion of the Advocate General, in paragraph 33 it is stated that the concept of securities in the expression 'securities which are negotiable on the capital market', used by MiFID I (also by MiFID II) and, therefore, the concept of 'securities', within the meaning of the Prospectus Directive (now Regulation 2017/1129), must be interpreted "broadly, in the sense that securities such as shares in companies fall within that concept, provided that the transfer of those securities is not subject to restrictions that would make their negotiability on the capital market, that is to say between offerors of such securities and potential investors, impossible or extremely difficult." The CJEU uses a broad concept of negotiability as characterising the concept of transferable securities negotiable on capital markets since it admits restrictions on free transferability as long as these do not make trading "impossible or extremely difficult".

§ 14. In accordance with the law in force at that time, 2004 MiFID I referred to this requirement in relation to admission to trading on a regulated market to require (Art. 40) that the securities be 'freely transferable'. However, the Admissions Directive (Directive 2001/34/EC) allowed shares to be considered as freely transferable when they were partially paid up, provided that this did not hinder their negotiability. It is not until MiFID II that the possibility of admitting transferable securities to trading on a regulated market with restrictions on their free transferability is expressly and generally included, provided that 'restriction is not likely to disturb the market' (Art. 1 of Commission Delegated Regulation (EU) 2017/568 of 24 May 2016 supplementing Directive 2014/65/EU of the European Parliament and of the Council with regard to regulatory technical standards for the admission of financial instruments to trading on regulated markets). The preliminary ruling does not cite this regulatory development - and it would have been advisable to do so, even if it was not in force at the time of the events - that would have allowed for greater reflection on negotiability, a characteristic of securities negotiable on capital markets or trading centres, attributed today *ex lege* to the shares of

public limited companies due to their legal status as transferable securities, without entering into the question of whether the approval of the company for the transfer of the shares is a restriction that disturbs the (normal) functioning of the market. What seems clear is that this is incompatible with the trading of the shares in a trading centre (regulated market or multilateral trading facility) but not in a broad concept of the securities or capital market, which is the context in which the obligation to draw up a prospectus and its exceptions must be assessed in this case and not in the context - because it was not - of an admission to trading, since the shares of *Holding Communal* were not the subject of an admission to trading nor was their admission to trading requested.

§ 15. We believe that the statements of the CJEU in paragraph 39 of the judgment should be interpreted in this context: "In the present case, it is apparent from the order for reference that the shares in the companies at issue in the main proceedings may be held only by the municipal and provincial entities of the Member State concerned and that their transfer is subject to the approval of the board of directors of that company. Subject to verification by the referring court, such shares do not appear to be subject to restrictions that make their trading between offerors of securities and investors impossible or extremely difficult, since those restrictions do not prevent those shares from being traded with a significant number of potential investors, despite the possibility that the offer may not lead to a transfer of the shares concerned, which may also arise in the case of offers relating to the securities of a company the transfer of which is not subject to approval by its board of directors."

Under prospectus law, municipalities are not considered qualified investors

§ 16. In our opinion, under current law, the facts of the case would be analysed with the *ex lege* consideration of the shares of public limited companies as transferable securities (Art. 4(1)(44) MiFID II to which the Prospectus Regulation refers) and the matter focused on the need, as the case may be, to draw up a prospectus in a capital increase of a non-listed company when it is addressed to shareholders who do not have the legal status of qualified investors and in which no other exceptions to the prospectus as provided for in Article 1(4) of the Regulation apply.